

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844.

**§ 842.1002 Definitions.**

As used in this subpart:

*Agency head* means the Secretary of the Department of Homeland Security. For purposes of an approval of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of Department of Homeland Security, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Homeland Security, or to the Deputy Secretary of Homeland Security, and who is the sole such representative for the entire department. For the purposes of a denial of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of Department of Homeland Security at any level within the Department of Homeland Security.

*Customs and border protection officer* means an employee in the Department of Homeland Security occupying a position within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position and whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry. Also included in this definition is an employee engaged in this activity who is transferred directly to a supervisory or administrative position in the Department of Homeland Security after performing such duties in 1 or more positions within the GS–1895 job series (determined applying the criteria in effect as of September 1, 2007), or any successor position, for at least 3 years.

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors. A first-level supervisor may occupy a primary position or a secondary position if the appropriate definition is met.

*Primary position* means a position classified within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position whose duties include the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

*Secondary position* means a position within the Department of Homeland Security that is either—

(1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of customs and border protection officers in primary positions; or

(2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary customs and border protection officer position is a prerequisite.

**§ 842.1003 Conditions for coverage.**

(a) *Primary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a primary customs and border protection officer position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

(3) A first-level supervisor position may be determined to be a primary position if it satisfies the conditions set forth in § 842.1002.

(b) *Secondary positions.* An employee's service in a position that has been determined by the employing agency

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head to be a secondary position is covered under the provisions of 5 U.S.C. 8412(d) if all of the following criteria are met:

(1) The employee, while covered under the provisions of 5 U.S.C. 8412(d) as a customs and border protection officer, is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) The employee has completed 3 years of service in a primary position, including service for which no FERS deductions were withheld; and

(3) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(c) For the purpose of applying the criteria at paragraph (b)(1) through (3) of this section to evaluate transfers, service, and employment periods that occurred before September 1, 2007—

(1) A primary position, covered under the provisions of 5 U.S.C. 8412(d), is deemed to include:

(i) A position whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry that was classified within the Immigration Inspector Series (GS-1816), Customs Inspector Series (GS-1890), Canine Enforcement Officer Series (GS-1801), or any other series which the agency head determines were predecessor series to the Customs and Border Protection Series (GS-1895), and that would have been classified under the GS-1895 series had it then existed; and

(ii) A position within the Customs and Border Protection Series (GS-1895) whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

(2) A secondary position is deemed to include:

(i) A first-level supervisor of an employee in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section; or

(ii) A executive, managerial, technical, semiprofessional, or professional position for which experience in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section is a mandatory prerequisite.

(d) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

### § 842.1004 Evidence.

(a) The agency head's determination under § 842.1003(a) that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 842.1002.

(b) A determination under § 842.1003(b) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(3), and the employee does not, within 6 months of entering the position formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.